U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date Issued: March 30, 1999

Case No.: 1997-INA-0026

***In the Matter of*:**

GOLDEN SHIELD TRADING, INC.
Employer,

***On Behalf of*:**

LI-CHU WU HUNG,
Alien.

Certifying Officer: Paul R. Nelson, Region IX

Appearance: Steven Frank Swanson, Esq.

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

The application was filed on January 13, 1996, by Golden Shield Trading, Inc. for the position of Bookkeeper, seeking labor certification for Li-Chu Wu Hung, Alien. The duties of the job were described as follows:

> Enters financial transactions onto general and separate ledgers. Reviews and verifies invoices of purchasing, selling and shipping. Contacts and confirms with vendors and suppliers (mostly in Taiwan) the details of charges, credit and billing disputes. Complies reports to show statistics including cash receipts and expenditures, accounts payable, accounts receivable. Maintains journals and books in proper order.

Employer required that applicants have two years of experience in the job offered or two years of experience as an Accounting Clerk or Accountant or two years of vocational training in accounting or bookkeeping. In addition, Employer required that applicants be able to speak and write Mandarin Chinese.

The Certifying Officer(CO) issued a Notice of Findings (NOF) proposing to deny certification on May 17, 1996. (AF 26-29) The CO stated that it appears that James Y. Lee, a qualified U.S. worker, was rejected for other than lawful job-related reasons in violation of 20 C.F.R. 656.21(b)(6) and/or 20 C.F.R. 656.21(j)(1). The CO instructed Employer to document with specificity, the lawful job-related reasons for rejecting Mr. Lee. The CO also stated that he doubted the credibility of Employer's report that Mr. Lee said that he was not interested in the job during the interview.

Employer, by counsel, filed rebuttal on June 10, 1996. Counsel argued that "Applicant Lee's explicit statement renders the assumption of the NOF unsupportable. If Employer's report is to be challenged it can be challenged only by reference to what applicant Lee may have to say about what Employer reported he said. As it now stands however Employer's report is evidence which, not withstanding applicant Lee's behavior prior to the interview, tends to establish that while applicant Lee may have been interested, following the interview he no longer was." (AF 13)

The CO issued a Final Determination (FD) denying certification on June 27, 1996. (AF 6-9) The CO stated that Mr. Lee, a qualified applicant, was informed of the job opportunity by the

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

state employment office (EDD) and followed through by contacting employer and participating in a job interview, thereby demonstrating interest in the job opportunity. The CO went on to note that Mr. Lee has been self-employed as a bookkeeper for the last seven years, with no ties to either banking or manufacturing. Therefore, the CO reasoned that Employer's unsubstantiated statement that Mr. Lee said he was not interested in the job because he preferred working for a bank or a large manufacturer, where he could have much room of progression, given his many years of senior accountant experience," was not convincing. (AF 9) The CO stated further that the lack of substantiation causes both the Employer's results of recruitment report and rebuttal to be unreliable. The CO concluded that Employer had failed to document lawful job-related reasons for rejecting Mr. Lee and had failed to document that the job was clearly open to U.S. workers. 20 C.F.R. § 656.21(b)(6), § 656.20(c)(8).

Employer wrote to the CO on July 17, 1996, stating that Mr. Lee had been referred to it by EDD on two occasions. The first referral occurred prior to the filing of the labor certification application. Employer stated that Mr Lee was contacted but declined to be interviewed stating that he was looking for a senior accounting position. The second referral occurred after the application was filed and Mr. Lee attended an interview, inquired in detail about the business and then advised Employer that he was not interested in the position; that he wanted to work for a bank or large manufacturer where he would have growth potential. Employer stated that the CO's denial should be reviewed and she provided Mr. Lee's address and telephone number (AF 2).

The CO considered Employer's letter to be a request for reconsideration which he denied on August 2, 1996. (AF 1) The CO then referred this case to the Board of Alien Labor Certification appeals for review. (AF 1)

Discussion

The issues are whether U.S. applicant James Y. Lee was rejected by Employer and if so was the rejection for lawful job-related reasons.

Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. 20 C.F.R. 656.21(b)(6) and 656.21(j)(1) provide that if U.S. workers have applied for the job, employer must document that they were rejected solely for lawful job-related reasons. An employer that fails to explain or document the U.S. applicant's lack of qualifications fails to specify a lawful job-related reason for rejecting the applicant. *Seaboard Farms of Athens, Inc.*, 90-INA-383 (Dec., 1991); *Tulasi Polavarapu, M.D.*, 90-INA-333 (Oct. 29, 1991); *D & J Finishing, Inc.*, 90-INA-446 (Aug. 13, 1991); *Poquito Mas*, 88-INA-486 (Feb. 26, 1990); *Vanguard Jewelry Corp.*, 88-INA-273 (Sept. 20, 1988). An employer must establish, by convincing evidence, that the U.S. applicant is not qualified for the position. *Nationwide Body Shops, Inc.*, 90-INA-286 (Oct. 31, 1991)

However, Employer contends that Mr. Lee was not rejected for the position, that Mr. Lee stated that he was not interested in the job during the interview. Employer reported that Mr. Lee inquired in detail about the business and the products that it imports and toured the facilities before saying that he was not interested in the job, that this was not his career goal; that he

wanted to work for a bank or large manufacturer where he would have the potential for professional growth. (AF 52)

The CO did not credit Employer's recruitment report because he deemed it unsubstantiated and Mr. Lee had shown interest in the job by attending the interview and was qualified and self-employed with no ties to banking or corporations. Indeed, Mr. Lee's resume indicates that he is self-employed and has been for seven years. But, it also reflects that Mr. Lee's career objective is to work as a senior accountant in a manufacturing company that will utilize his education and experience, and provide opportunities for promotions to higher level management positions. (AF 69) Mr. Lee's career objective is consistent with Employer's recruitment report, rebuttal argument and request for review statements.

Mr. Lee is highly qualified for an accounting position. He has a Bachelor and Master's degree in accounting and more than twenty years of accounting experience with a corporation, bank and self-employment. Since he has been self-employed for seven years, it would appear that he does not have to accept the first job offer and can be more selective in his choice of jobs. Moreover, his qualifications make him a suitable candidate for employment with a large corporation or bank. It is very believable that Mr. Lee accepted Employer's interview invitation to see what the job had to offer, learned more about Employer's business and decided that he was not interested; that he was looking for a different position more consistent with his career objectives.

EDD wrote to Mr. Lee on October 10, 1995 and asked him to complete and return a questionnaire which asked questions about the recruitment and interview process with Employer. Mr. Lee did not respond. His failure to respond to EDD's letter suggests that he was not interested in the job, in support of Employer's contention (AF 53). Had Mr. Lee been unfairly treated by Employer and still interested in the job, he could have reported it to EDD by completing and returning the questionnaire. Indeed, another U.S. applicant, Lily Hugh, did respond to her questionnaire, indicating that she was offered the job (AF 63). Apparently applicant Hugh did not accept the job, but the offer is a clear indication that the job opportunity was open to any qualified U.S. worker.

Contrary to the CO's determination, we are of the opinion that Employer accurately reported that Mr. Lee was not interested in the job. Substantiation can be found in Mr. Lee's superior accounting qualifications, his career objective and his failure to respond to EDD's inquiry about Employer's recruitment efforts. Moreover, Employer's recruitment report and letter seeking review of the denial are consistent and have the ring of truth. (AF 52, 2)

We find that Employer did not reject U.S. applicant James Y. Lee. Accordingly, the denial of certification must be vacated and reversed.

ORDER

The denial of labor certification is **REVERSED,** and it is ordered that certification be **GRANTED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.